Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

ALBERT G. BUSTAMANTE,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a United States Congressman can be convicted of receiving a gratuity under 18 U.S.C. § 201(c)(1)(B), without proof of criminal intent.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Albert G. Bustamante respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 13, 1995.

OPINION BELOW

The opinion of the court of appeals, styled *United States v. Albert G. Bustamante,* is published at 45 F.3d 933 (5th Cir. 1995), and was entered on February 13, 1995. A copy of the opinion is reproduced at Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 13, 1995. On April 5, 1995, the petition for rehearing and suggestion for rehearing en banc were denied. A copy of the Court's order denying rehearing is reproduced at Appendix B. This petition is filed within ninety days of the denial of the petition for rehearing. SUP. CT. R. 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 18 United States Code § 201(c)(1)(B) provides that:

> (c) Whoever –
>
> (1) otherwise than as provided by law for the proper discharge of official duty –
>
> (B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person . . .

> shall be fined under this title or imprisoned for not more than two years, or both.

STATEMENT

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. § 3231.

On November 6, 1984, Petitioner, Albert G. Bustamante, was elected to the United States House of Representatives as the representative for the Twenty-Third Congressional District of Texas. Petitioner served several terms in Congress until his defeat in the general election of November 1992. On February 18, 1993, Petitioner was charged in a ten-count indictment with one count of racketeering (RICO), in violation of 18 U.S.C. § 1962(c); with one count of racketeering (RICO) conspiracy, in violation of 18 U.S.C. § 1962(d); and with eight counts alleging the receipt of unlawful gratuities, in violation of 18 U.S.C. § 201(g), and its successor statute, § 201(c)(1)(B).

Following a jury trial in the United States District Court for the Western District of Texas, Petitioner was acquitted of all counts except the RICO violation charged in Count One, and a gratuity violation charged in Count Four. Petitioner's racketeering conviction was based upon the jury's finding that he committed predicate Racketeering Acts 1 and 3 – the bare minimum for conviction. App. A. at 2-3. Racketeering Act 3 was identical to the gratuity substantively charged in Count Four.

Petitioner was sentenced to a total term of 42 months confinement in the custody of the Bureau of Prisons,

followed by a term of supervised release. Petitioner was fined $55,000 and directed to pay $100 in mandatory assessments in aid of crime victims, pursuant to 18 U.S.C. § 3013.

In Count Four, the government alleged that Petitioner received gratuities in the form of "a loan guarantee . . . and the promise of future loans . . . all at no personal risk to [Petitioner] . . . " for and because of official acts performed and to be performed by Petitioner, otherwise than as provided by law for the proper discharge of official duty. Count Four incorporated by reference Paragraph 11 of the indictment which generally described the overall nature of Petitioner's investment in a corporation called San Antonio Video Corporation. App. C. at 36-39.

As described in Paragraph 11, and at trial, when Petitioner won the Democratic primary election for the Twenty-Third Congressional District in May of 1984, his election to Congress in the November general election was virtually assured. In the summer of 1984, between the primary and general election, two San Antonio attorneys, Mr. Oliver Heard, Jr., and Mr. Larry Macon, formed a corporation called San Antonio Video Corporation (SAVC) for the purpose of acquiring a license for a new television broadcasting station to be awarded by the Federal Communications Commission (FCC). As described at trial, Mr. Heard and Mr. Macon had been friends of Petitioner for more than twenty years and, for this reason, invited him to participate in the venture.

Mr. Macon testified at trial that the costs of the project were to be shared by all of SAVC's shareholders.[1] All shareholders were required to make an initial stock purchase and, if the license were awarded, each would be required to contribute a pro rata share of the start-up costs estimated between $4 million and $5 million. Petitioner's pro rata obligation for the initial stock purchase was $15,000. If the license were awarded, Petitioner would have been obligated to contribute another $650,000 toward the start-up costs.[2]

In April of 1985, Petitioner borrowed $15,000 from Groos Bank in San Antonio to finance his initial stock purchase.[3] With the stock purchase, Petitioner owned a 16.5% interest in SAVC. According to a bank officer, the loan to Petitioner was guaranteed by Oliver Heard. Though the opinion is somewhat unclear on this point, Mr. Heard executed only one guarantee on April 16, 1985, which was general and continuing in nature, and which

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[1] Mr. Macon, Mr. Heard, and Petitioner, each owned a 16.5% equity share in SAVC. The law firm of Heard, Goggin, Blair & Williams held 33% of the equity stock. The voting stock was held by three women.

[2] According to Mr. Macon at trial, had SAVC been awarded the license, he and Mr. Heard intended to borrow the start-up money from a lending institution using the license as collateral. Heard and Macon then intended to lend each investor across the board his or her share of the start-up costs which would be repaid from station revenues. Through his purchase of shares of stock in SAVC, Petitioner would have owned a pro rata share of the license had it been awarded.

[3] The loan was a three-year term loan with payments to be made once each calendar year.

by its terms could be applied by Groos Bank at its election to secure up to $20,000 of loans to Petitioner and his wife.

At trial, Petitioner contended that he had no knowledge that Mr. Heard had guaranteed his loan with Groos Bank and, indeed, first learned of the Heard guarantee when criminal charges were brought against him. Both Petitioner and his wife testified without contradiction that they had never been informed by either Mr. Heard, or by anyone at the bank, of the existence of the guarantee. Petitioner and his wife also testified that they had borrowed money from Groos Bank on other occasions without collateral or other security.[4] It was uncontested that, despite the Heard guarantee, all of the loan documents provided to Petitioner and his wife by the bank reflected that the loan was unsecured. The only documentary evidence of the Heard guarantee appeared on an internal bank document which the bank officer testified was not shown to either Petitioner or his wife.

Apart from the documents, the bank officer testified that Groos Bank did not have a policy requiring that

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[4] The trial evidence showed that Groos Bank had previously loaned Petitioner $50,000 for campaign expenses on an unsecured basis, and without any guarantees. Prior to converting the term note in issue here to an installment note in July of 1988, Petitioner and his wife borrowed $15,000 from Groos Bank toward the purchase of their home in Arlington, Virginia. This loan, too, was unsecured and unsupported by the Heard guarantee. Regardless of whether a particular loan was supported by the Heard guarantee, all of the loan documents tendered to Petitioner and his wife looked identical and reflected that the various loans were unsecured.

guarantees be disclosed to its borrowers. The bank officer testified that he had no specific recollection of informing either Petitioner or his wife of the existence of the Heard guarantee.[5]

Beyond the issue of knowledge, Petitioner defended on the basis that, contrary to the allegation in Count Four, he was "at risk" on the loan from Groos Bank. At trial, the bank officer testified that, even with the Heard guarantee, Petitioner was absolutely at risk on the loan. The court below determined that, although Petitioner may have been at risk on the particular loan, he was not at risk on the investment as a whole. App. A. at 14-15. Despite the charging language in Count Four, which described the gratuity received by Petitioner as a loan guarantee and the promise of future loans, the court below determined that the gratuity actually consisted of the entire "carry" to include the repayment of the loan in October of 1988.[6]

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[5] In finding the circumstantial evidence sufficient to support Petitioner's knowledge of the existence of the Heard guarantee, the court below concluded that, based upon Petitioner's "long friendship with Heard and the context of the entire transaction," the failure of the bank officer to recall informing Petitioner of the guarantee was not fatal to the Government's case. App. A. at 15.

[6] The court's interpretation of Count Four was crucial to its rejection of Petitioner's argument that the acts which constituted the gratuity – the loan guarantee (April of 1985), and the promise of future loans (summer of 1984) – were outside the statute of limitations. Only though a broad interpretation of Count Four, to include the "carry", could the government bring its case within the limitations period.

SAVC was not awarded the license by the FCC. App. A. at 12. SAVC appealed to the FCC Review Board which affirmed the rejection of SAVC's application. *Id.* In July of 1988, SAVC entered into a settlement with the prevailing party in which SAVC agreed to forego any further challenge to the FCC's decision in exchange for a monetary settlement. *Id.* According to Mr. Macon, the settlement was designed to make all of the investors whole by reimbursing them for their out-of-pocket expenses.

During this three year period, Petitioner made no payments on the note.[7] App. A. at 12. In July of 1988, Petitioner refinanced the loan with Groos Bank, including the accrued interest, converting the term loan to an installment note. App. A. at 12. As it had on the original loan, Groos Bank applied Mr. Heard's 1985 guarantee to Petitioner's refinanced loan, though it again tendered documents to Petitioner and his wife which indicated that the loan was unsecured.[8]

On October 24, 1988, SAVC received settlement proceeds in the amount of $175,000 which were deposited into the Heard firm's trust account. App. A. at 12. On October 27, 1988, Mr. Heard wrote a check from the trust account to Petitioner in the amount of $19,467.53 – the

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[7] Though Petitioner did not make his annual payments, at no time did Groos Bank declare the note in default; nor had the loan matured. Similarly, the bank never looked to Mr. Heard for payment.

[8] There was no evidence that Groos Bank would not have loaned money for the SAVC venture to Petitioner or his wife absent the Heard guarantee. The bank officer testified that Petitioner and his wife had excellent credit, and that he had no idea whether the bank would have required a guarantee, or any additional collateral, to approve the loan in issue here.

exact amount Petitioner owed on his outstanding debt to Groos Bank. App. A. at 12-13. Petitioner used his share of the SAVC settlement proceeds to extinguish this debt. App. A. at 13. The $19,467.53 reflected approximately 11% of the gross settlement and did not include $1330.00 in installment payments Petitioner and his wife previously had made to reduce the loan balance.[9] Had Petitioner taken a full 16% share of the settlement, he would have received approximately $28,000. There was no evidence in the record that the check to Petitioner reflected anything other than his share of the settlement proceeds, less his share of the expenses of the investors.

Petitioner moved for judgment of acquittal at the close of the Government's case-in-chief, and at the close of all of the evidence. In reliance on the Second Circuit's decision in *United States v. Muntain*, 610 F.2d 964 (2d Cir. 1979), Petitioner argued that the government had failed

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[9] Though the court below concluded that Petitioner received preferential treatment by Mr. Heard, who repaid Petitioner before payment was made to the other investors, App. A. at 13, there was no evidence in the record that Petitioner was aware that he had been paid in a manner different from anyone else. Petitioner was paid before Mr. Macon's letter, dated October 31, 1988, which proposed a plan for disbursing the settlement proceeds. Petitioner contended that there was no evidence that Heard made an exception for him inasmuch as he was entitled to his pro rata share of the settlement, and was paid at a time when there was no plan in place for its disbursement.

Likewise, the opinion below states that Petitioner's loan at Groos Bank was repaid by Mr. Heard and Mr. Macon. App. A. at 15. ("Heard and Macon gave Bustamante the precise amount needed to repay his investment loan . . . "). In fact, Petitioner was an equity shareholder and, as such, was entitled to a pro rata share of the settlement proceeds, less expenses.

to make any connection between the gratuities alleged and any of Petitioner's official conduct. In Petitioner's case, as in *Muntain*, counsel argued the construction of 18 U.S.C. § 201(c)(1)(B) advocated by the government was too broad.

On appeal, the Fifth Circuit affirmed Petitioner's convictions and sentences in all respects. In rejecting Petitioner's sufficiency challenges to his conviction of Count Four, the Fifth Circuit generally described the Government's burden of proof in this way:

> To find a public official guilty of accepting an illegal gratuity, a jury must find that the "official accepted, because of his position a thing of value 'otherwise than as provided by law for the proper discharge of official duty.' " *Evans*, 572 F.2d at 480. Generally, no proof of quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office. *Id.* at 479; *United States v. Secord*, 726 F.Supp. 845, 847 (D.D.C. 1989) (sufficient for government to show that gratuity was given simply *because of* [a person's] official position, in appreciation for their relationship, or in anticipation of its continuation"). In addition, the jury need not find that the official accepted the gratuity with the intent to be influenced. The jury must only conclude that the evidence established beyond a reasonable doubt that the official accepted unauthorized compensation. *Evans*, 572 F.2d at 480.

App. A. at 13 (emphasis in original). Rejecting Petitioner's argument on *mens rea* – that there must be some connection between the receipt of a thing of value and

official conduct before criminal liability can be imposed – the court had this to say:

> The jury was also entitled to conclude that Bustamante received the SAVC gratuity because of his status as a Congressman. . . . The government produced evidence that Heard's firm called on Bustamante to assist them in his official capacity, demonstrating that Heard had reason to appreciate his relationship with the Congressman and anticipate its continuation. Considering these circumstances, the jury was entitled to find that Heard and Macon sustained Bustamante throughout his SAVC investment because he was a member of the United States Congress.

App. A. at 16.

REASONS FOR GRANTING THE WRIT

Directly contradicting this Court's decision in *United States v. Brewster,* 408 U.S. 501 (1972), the Fifth Circuit has construed 18 U.S.C. § 201(c)(1)(B), to dispense with the requirement of criminal intent. Under the Fifth Circuit's construction of the gratuity statute, substantial criminal penalties may be imposed upon a public official who knowingly receives a thing of value. In *Brewster,* this Court construed the gratuity statute to require a higher level of *mens rea.* Under *Brewster,* the government must prove more than that a public official knowingly received a thing of value, it must prove that the official received the thing of value with knowledge that the donor was paying him compensation for an official act. Beyond the

conflict with *Brewster,* and with opinions from other courts of appeals which have properly applied *Brewster,* the Fifth Circuit's construction of the gratuity statute also conflicts, at least in principle, with this Court's recent decisions on *scienter* in *Staples v. United States,* 114 S.Ct. 1793 (1994); *United States v. X-Citement Video, Inc.,* 115 S.Ct. 464 (1994); and, *Ratzlaf v. United States,* 114 S.Ct. 655 (1994), all of which require that a defendant have knowledge of the fact which makes his conduct criminal. Certiorari should be granted because the decision below conflicts with decisions on the same matter from this Court, and from several other courts of appeals.

Additionally, this Court should grant certiorari because there is some suggestion in both the legislative history of 18 U.S.C. § 201, and this Court's decision in *McCormick v. United States,* 111 S.Ct. 1807 (1991), that a higher level of *mens rea* may be required under the gratuity statute where the defendant is an *elected* public official.

I. THE FIFTH CIRCUIT HAS CONSTRUED 18 U.S.C. § 201(c)(1)(B) IN CONFLICT WITH THIS COURT'S DECISION IN *UNITED STATES V. BREWSTER,* 408 U.S. 501 (1972).

A. *Brewster* Requires Proof That The Accused Had Knowledge That The Donor Was Compensating Him For An Official Act.

In Petitioner's case, the Fifth Circuit has construed 18 U.S.C. § 201(c)(1)(B) in a manner which conflicts with this Court's decision in *United States v. Brewster,* 408 U.S. 501 (1972). In *Brewster* this Court examined a count of the

indictment which charged a former Senator with taking a gratuity in violation of 18 U.S.C. § 201(g), the predecessor statute to § 201(c)(1)(B):

> This count is founded on 18 U.S.C. § 201(g), which provides that a Member of Congress who "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him" is guilty of an offense. Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that appellee solicited, received, or agreed to receive, money *with knowledge that the donor was paying him compensation for an official act.* Inquiry into the legislative performance itself is not necessary; evidence of the Member's *knowledge* of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

Id. at 527 (emphasis supplied).

B. The Fifth Circuit, Contrary To *Brewster*, Has Dispensed With The *Scienter* Requirement.

The court below did not mention the *Brewster* decision. Rather, in discussing the level of *mens rea* necessary to support a conviction under the gratuity subsection of § 201, the Fifth Circuit relied on two cases, *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978) (en banc); and *United States v. Secord*, 726 F.Supp. 845 (D.D.C. 1989). App. A. at 13.

In *Evans*, the en banc court recognized that any inquiry into the issue of *mens rea* must focus on the defendant's state of mind because "the giving and receiving of an unlawful gratuity are not interdependent offenses; the donee's intent may differ from the donor's." *United States v. Evans*, 572 F.2d at 479.[10] Nonetheless, the court concluded that, under the gratuity subsection of § 201, it is criminal for a public official simply "to accept a thing of value to which he is not lawfully entitled, regardless of the intent of the donor or donee." *Id.* Indeed, under the Fifth Circuit's construction of the gratuity statute in *Evans*, all the government need show is that a public official accepted the things of value "knowingly and purposefully and not through accident, misunderstanding, inadvertence, or other innocent reasons." *Id.* at 479-80. As articulated by the Fifth Circuit in *Evans*, the level of *mens rea* necessary for conviction is the mere "knowing receipt" of a thing of value. Applying this principle to Petitioner's case, the court concluded that the government was required to prove only that Petitioner "knew that Heard and Macon were giving him a risk-free investment in SAVC." App. A. at 15.

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[10] Likewise, the D.C. Circuit has pointed out that it is the defendant's intent which is controlling, and the donor's intent may differ from the donee's. *United States v. Anderson*, 509 F.2d 312 (D.C.Cir. 1974). As stated there:

> Thus, the donor may be convicted of giving a bribe despite the fact that the recipient had no intention of altering his official activities, or even lacked the power to do so.

Id. at 332.

The court below also relied on *United States v. Secord*, 726 F.Supp. 845 (D.D.C. 1989), though *Secord* is readily distinguishable on its facts. Unlike Petitioner, Admiral Secord was not charged with having *accepted* gratuities but, rather, with having *given* them – here, to Lieutenant Colonel Oliver North.[11] In the context of a discovery dispute, the district court stated in *dicta* that, at trial, the government would be required to show merely that Admiral Secord gave Lieutenant Colonel Oliver North things of value "simply because of North's official position, in appreciation for their relationship, or in anticipation of its continuation." *Id.* at 847.

Applying *Secord* to Petitioner's case, the court below focused on the states of mind of Larry Macon and Oliver Heard – the donors in this case – rather than on Petitioner's own. Hence, the court found that the jury was entitled to conclude that Petitioner received the SAVC gratuity because of his status as a Congressman. App. A. at 16. And, further, that:

> Heard had reason to appreciate his relationship with the Congressman and anticipate its continuation.
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> * * *
>
> [T]he jury was entitled to find that Heard and Macon sustained Bustamante throughout his

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[11] While a public official may be convicted of receiving a gratuity under 18 U.S.C. § 201(c)(1)(B), a person may be convicted of giving, offering, or promising a gratuity to a public official under 18 U.S.C. § 201(c)(1)(A). Both subsections of § 201(c), however, require that the receipt or the offer be "for or because of any official act performed or to be performed."

> SAVC investment because he was a member of the United States Congress.

Id. From the foregoing passages, it is apparent that the court affirmed Petitioner's convictions by conflating donor/donee intent.

When it dispensed with the requirement that the government prove that Petitioner had knowledge that the donor was paying him as compensation for an official act, the Fifth Circuit decided an important issue of federal law in conflict with *United States v. Brewster*, 408 U.S. 501 (1972). Certiorari should be granted because of this conflict. *See* SUP. CT. R. 10.1(c).

II. THE FIFTH CIRCUIT'S DECISION DISPENSING WITH THE NECESSITY OF PROVING *SCIENTER* CONFLICTS IN PRINCIPLE WITH DECISIONS FROM THIS COURT.

Traditionally, *scienter* is a necessary element in every crime. *United States v. Balint*, 258 U.S. 250, 253 (1922); *Liparota v. United States*, 471 U.S. 419, 425 (1985).

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Staples v. United States, 114 S. Ct. 1793, 1797 (1994), *quoting, Morissette v. United States*, 342 U.S. 246, 250 (1952).

Offenses that require no *mens rea* are generally disfavored, and this Court has suggested that "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Id.*

The Fifth Circuit's treatment of the issue of *mens rea* under the gratuity statute cannot be harmonized with the Court's recent *scienter* decisions. In *Staples v. United States, supra,* the issue was whether, to convict a defendant under 26 U.S.C. § 5861(d), making it unlawful for any person to possess a machinegun, the government must prove beyond a reasonable doubt that the person "knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." *Id.* at 1795. It was the government's contention that, for purposes of liability under the statute, it need only prove that a person know that the weapon he possesses is a firearm in the general sense. *Id.* at 1799. In rejecting the government's argument, this Court pointed out that it has taken particular care "to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.' " *Id.* at 1799, *quoting, Liparota,* 471 U.S. at 426. Thus, this Court held, to obtain a conviction under 26 U.S.C. § 5861(d), the Government must prove that the individual knew the features of his weapon which brought it within the scope of the Act. *Id.* at 1804. In *Ratzlaf v. United States,* 114 S.Ct. 655 (1994), this Court was asked to construe 31 U.S.C. § 5322 and § 5324, which make it unlawful for a person willfully to engage in conduct designed to evade a financial institution's reporting requirements triggered whenever it participates in a cash transaction that

exceeds $10,000. *Id.* at 657. Rejecting the government's argument that structuring is obviously evil and inherently bad – thus satisfying the element of "willfulness" – this Court held that, to support a defendant's conviction under 31 U.S.C. § 5322 and § 5324, the Government must prove that the defendant knew not only of the bank's duty to report cash transactions in excess of $10,000, "but also of his own duty not to avoid triggering such a report." *Id.* at 662.

Finally, in *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464 (1994), this Court construed 18 U.S.C. § 2252, prohibiting interstate trafficking in child pornography. *Id.* at 466. This Court concluded that the term, "knowingly," as used in § 2252, extended to both the sexually explicit nature of the material, and to the age of the performer. *Id.* at 472. In so doing, this Court relied on *Morissette* and *Staples* which instruct that the presumption in favor of a *scienter* requirement should apply to each of the statutory elements which criminalizes otherwise innocent conduct. *Id.* at 469. To construe § 2252 otherwise, this Court recognized, would bring within its reach individuals who had no idea that they were even dealing with sexually explicit material. *Id.* at 467. As but one example, this Court noted that, if a prior tenant had requested delivery of materials covered by § 2252, his residential successor could be prosecuted for mere "knowing receipt" of such materials. *Id.* Such an interpretation of § 2252 extends its reach too far.

The unifying principle of this Court's recent *scienter* cases is that, where a person's conduct is not obviously

criminal, that person must have knowledge of the essential fact which makes his conduct unlawful before felony penalties can be imposed.

The same principle applies to Petitioner's case. Receiving a loan guarantee from a friend of 20 years is not, of itself, criminal. Nor, do we believe, that Petitioner's mere status as a Congressman is sufficient to transform this ordinary act into the felony offense of receiving a gratuity. The Government simply must prove more. This Court's articulation in *Brewster* of the level of *mens rea* necessary to support conviction under the gratuity statute is in harmony with this Court's recent *scienter* decisions in that it requires knowledge of the essential fact which makes otherwise innocent conduct unlawful – here, knowledge on the part of the donee that the donor is compensating him for an official act.

Under all of these authorities, the Fifth Circuit's construction of 18 U.S.C § 201(c)(1)(B) is overly broad, and criminalizes otherwise innocent conduct in the absence of *mens rea*. Certiorari should be granted because the decision below conflicts, in principle, with applicable decisions of this Court. *See* SUP. CT. R. 10.1(c).

III. THE FIFTH CIRCUIT'S CONSTRUCTION OF 18 U.S.C. § 201(c)(1)(B) CONFLICTS WITH DECISIONS FROM OTHER COURTS OF APPEALS ON THE SAME MATTER.

Petitioner has found no case outside the Fifth Circuit which permits a conviction under the gratuity statute based upon a mere "knowing receipt" of a thing of value.

In *United States v. Previte*, 648 F.2d 73 (1st Cir. 1981), the First Circuit expressly adopted the *mens rea* requirement articulated by this Court in *Brewster*:

> In contrast under the gratuity statute, "otherwise than as provided by law for or because of an official act" carries the concept of the official act being done anyway, but the payment only being made because of a specifically identified act, and with a certain guilty knowledge best defined by the Supreme Court itself, *i.e.*, "with knowledge that the donor was paying him compensation for an official act."

Id. at 82; *see also United States v. Biaggi*, 853 F.2d 89, 99 (2d Cir. 1988) (the jury could infer that the "vacations were given and accepted in exchange for Biaggi's efforts on behalf of Coastal"); *United States v. Muntain*, 610 F.2d 964, 968 (D.C. Cir. 1979) (section 201 of Title 18 is an anti-bribery statute aimed at preventing public officials from accepting anything of value in exchange for particular decisions or actions taken or to be taken by the public officials in their official capacity); *United States v. Niederberger*, 580 F.2d 63, 68-9 (3d Cir. 1978) ("What is proscribed, simply put, is a public official's receipt of a gratuity to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver").

In *United States v. Campbell*, 684 F.2d 141 (D.C. Cir. 1982), a municipal judge was convicted of receiving a gratuity from a trucking company who moved the judge without charge. *Id.* at 144. The trucking company had

failed to purchase special use permits for its trucks, resulting in hundreds of traffic tickets for weight violations. *Id.* In over 90% of the company's 1138 tickets which came before Judge Campbell, the judge suspended sentence. *Id.* On another occasion, the judge dismissed a bloc of 95 tickets for the trucking company, though he was not assigned to traffic court that day. *Id.* at n.3.

On the issue of *scienter*, the court of appeals had this to say:

> It is no easy task to articulate the requisite intent necessary to constitute accepting or giving an illegal gratuity. That statute requires that a bribe be given or received "corruptly," whereas the intent required by the gratuity section is expressed by the language "otherwise than as provided by law for the proper discharge of official duty."

Id. at 149. Expressly relying on *Brewster*, the court pointed out that:

> However difficult it may appear for juries to distinguish illegal gratuities from legitimate campaign contributions to elected officials, no similar problems attend deciding whether a judge has accepted gifts "with knowledge that the donor was paying him compensation for an official act."

Id. at 150, *quoting, United States v. Brewster*, 408 U.S. 501, 527 (1972). Accordingly, the D.C. Circuit Court of Appeals found the evidence sufficient to support Judge Campbell's conviction for receiving a gratuity, finding that

"Judge Campbell knew the movers' assistance was a gratuity rendered for or because of his official acts."[12] *Id.* at 146.

The other circuits which have addressed the issue have concluded, as did this Court in *Brewster,* that the statute requires proof that the gratuity was accepted with knowledge that the donor was paying compensation for an official act. Only the Fifth Circuit holds otherwise. Certiorari should be granted in this case because the Fifth Circuit has rendered a decision in conflict with the decisions of other United States courts of appeals on the same matter. *See* SUP. CT. R. 10.1(a).

IV. 18 U.S.C. § 201(c)(1)(B) MAY REQUIRE A HIGHER LEVEL OF *MENS REA* WHEN APPLIED TO THE CONDUCT OF AN *ELECTED* PUBLIC OFFICIAL.

In 1962, Congress recodified existing bribery and conflict of interest statutes, consolidating many of the former laws into a single comprehensive section of the Criminal Code. S.Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. & Admin. News p. 3852. As described in the Senate Report, the recodification of § 201 of Title 18 used substantially the same language as the former statute, and made "no significant changes of substance." *Id.* at 3853.

That there might be defects in the legislation, as it applied to Members of Congress, was recognized prior to passage of the recodification into law. Senator Kenneth B.

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[12] Here, the favorable treatment of the company's traffic tickets.

Keating, for one, expressed the view that, though the legislation modernized and strengthened existing conflict-of-interest laws, it failed to deal with conflict-of-interest problems affecting Members of Congress. *Id.* at 3865. Senator Keating expressed the following concerns:

> Conflict-of-interest questions confront Member of Congress almost daily. For example, should a Representative or Senator vote on matters in which he has some personal financial stake? What are the proper limits on the appointment of relatives to the Member's staff? What kind of outside employment and income are compatible with certain committee assignments? What campaign contributions are properly acceptable and which are not? What are the limits on a Member's representation of constituent interests before the regulatory agencies and other Government departments? Under what circumstances, if any, should Members be permitted to accept fees for speeches to various interest groups?

Id. at 3865. As a consequence of the absence of "legislative machinery" for dealing with these questions, Senator Keating noted, each Member must act on his own judgment which, in light of pressures on him, may be a faulty guide, regardless of his good intentions. *Id.* at 3865. Senator Keating pointed out that, while some conflict-of-interest situations were obvious, others were not very apparent:

> The criminal law, with its requirements of malice and willfulness, does not offer a practical solution for cases in this shadowland of conduct.

Id. at 3866.

This Court, and at least two courts of appeals, have recognized that a higher level of *mens rea* may be required under certain criminal statutes when applied to an elected public official. *McCormick v. United States*, 111 S.Ct. 1807 (1991); *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978) (en banc); *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974). As stated in *Brewster*:

> [W]hether a statute provides fair warning of the conduct it seeks to prohibit depends in part on the persons to whom and the setting in which the statute is applicable.

Id. at 73 n.26, 77 n.40.

In *United States v. Evans*, 572 F.2d 455 (1978), the Fifth Circuit concluded that the level of *mens rea* necessary to support the conviction of a public official under the gratuity statute need be no more than the "knowing receipt" of a thing of value. Importantly, the Fifth Circuit expressly left open the question of whether a higher level of *mens rea* would be required under the gratuity statute when applied to an elected public official. As stated there:

> We need not determine what type of intent would have been necessary had Evans been an elected public official.

Id. at 481 n.30. Inherent in the Fifth Circuit's statement is the recognition that, unlike an ordinary public official, who owes the government his "first and highest obligation," an elected official's duties are more complex. Fundamentally, it is the duty of an elected official to serve his constituents – whether individuals or groups – and to support legislation which benefits both his district and

his constituents. Because of an elected official's special duties, unique problems are presented in the application of a conflict-of-interest statute to the conduct of an individual whose function it is to advocate purely private interests.

As articulated in *Evans*, the broad purpose of the gratuity statute is to reach situations in which the official's judgment might be clouded by the receipt of a benefit. Because a public official owes his professional loyalty first and foremost to the government he serves, the receipt of any unauthorized benefit creates a conflict-of-interest, and, hence, is criminalized under § 201(c)(1)(B). By contrast, because it is the duty of an elected official to advocate the interests of those individuals and groups which make up his constituency, an elected official's conduct does not fall within the broad remedial purpose of the gratuity statute, absent a showing of corrupt intent.

This Court addressed a very similar problem in *McCormick v. United States*, 111 S.Ct. 1807 (1991). McCormick, a state legislator, was indicted under the Hobbs Act for extorting property under color of official right.[13] *Id.* at

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[13] Beginning in 1972, courts began to apply the Hobbs Act to bribery cases. *Id.* at 1819. (SCALIA, J., concurring). As pointed out by Justice Scalia:

> It is acceptance of the assumption that "under color of official right" means "on account of one's office" that brings bribery cases within the statute's reach . . .
>
> * * *

1809. McCormick's conduct consisted of soliciting and receiving campaign contributions from foreign doctors at the same time he was sponsoring legislation for their benefit. *Id.* at 1810.

The court of appeals affirmed McCormick's convictions under the Hobbs Act observing that "nonelected officials may be convicted under the Hobbs Act without proof that they have granted or agreed to grant some benefit or advantage in exchange for money paid to them" and elected officials should be held to the same standard when they receive money other than "legitimate" campaign contributions. *Id.* at 1811. This Court rejected the reasoning of the court below, and construed the Hobbs Act to require a higher level of *mens rea* – that of a *quid pro quo* – when applied to an elected official's receipt of campaign contributions.

> Whatever ethical considerations appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right."

Id. at 1816.

[W]here the United States Code explicitly criminalizes conduct such as that presented in this case, it calls the crime bribery, not extortion –
Id. at 1819-20.

Though *McCormick* was expressly limited to an elected official's conduct vis-a-vis campaign contributions, this Court left open the question of whether a *quid pro quo* requirement might exist in other contexts, "such as when an elected official receives gifts, meals, travel expenses, or other items of value." *Id.* at 1817 n.10. Petitioner contends that reasoning identical to that in *McCormick* should apply under the gratuity statute where the defendant is an elected official. Otherwise, the construction of the statute is so broad that the elected official's ordinary acts are transformed into criminal conduct. Indeed, the Fifth Circuit's construction of § 201(c)(1)(B) is so broad that a Congressman is subject to prosecution and conviction if he receives bus fare from a constituent, or accepts a meal, a cup of coffee, or a drink at a bar. Surely, Congress could not have intended that the gratuity statute reach so far.

In the same way that the Hobbs Act was construed to require a higher level of *mens rea* when applied to an elected official's receipt of campaign contributions, we contend that the gratuity statute should be construed by this Court to require a *quid pro quo* when applied to the conduct of an elected official. Certiorari should be granted to decide this important issue of federal law which has not been, but should be, settled by this Court. *See* SUP. CT. R. 10.1(c).

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Honorable Court grant certiorari to review the decision of the court of appeals in this case.

Respectfully submitted,

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